NCN: [2025] UKUT 384 (AAC)

IN THE UPPER TRIBUNAL **Appeal No. UA-2024-000718-NT**
(ADMINISTRATIVE APPEALS CHAMBER)
TRAFFIC COMMISSIONER APPEALS

Between:

Xport Transport Ltd

Appellant

- v -

Driver and Vehicle Agency (Northern Ireland)

Respondent

Before:	Ms L. Joanne Smith: Judge of the Upper Tribunal Mr D. Rawsthorn: Member of the Upper Tribunal Mr S. James: Member of the Upper Tribunal
Hearing date:	22 January 2025
Heard at:	Tribunals Hearing Centre, Royal Courts of Justice, Belfast
Representation	
Appellant:	Mr D McNamee, Solicitor
Respondent:	Ms A Jones, BL
On appeal from:	The decision of the Presiding Officer on behalf of the Department for Infrastructure
Reference No:	ON2006515
Decision under appeal:	12 May 2024
Date of UT Decision:	12 November 2025

KEYWORDS: Procedural irregularity; late disclosure of evidence; revocation of operator's licence; loss of repute; financial standing; proportionality; representations

Cases referred to: *Fergal Hughes v DOENI & Perry McKee Homes Ltd v DOENI* [2013] UKUT 618 AAC NT/2013/52 & 53*; Bradley Fold Travel Ltd & Anor v Secretary of State for Transport* [2010] EWCA Civ 695*. Clarke v Edinburgh & District Tramways Co Ltd* [1919] UKHL 303; (1919) SC (HL) 35; 56 SLR 303*.* 2004/407 *PF White-Hide*. 2001/39 *BKG Transport.* NT/2014/19 *OC International Transport Ltd v DOENI.* T/2012/34 *Martin Joseph Formby t/a G&G Transport.* T/2013/38 *Hobart Court Property Management Ltd v John Kent and Valerie Kent. Balwant Singh Uppal t/a Professional Chauffeuring Services and PCS Limos Limited* [2014] UKUT (AAC). *T/2015/39 Firstline International Ltd & William Lambie v Secretary of State for Transport*). *Thomas Muir Haulage Ltd v Secretary of State* 1998 SLT 666. *Bryan Haulage (No.2)* (T2002/217). *2009/225 Priority Freight Ltd & Paul Williams. 2016/046 R & M Vehicles Ltd, Graham Holgate and Michael Holgate*. *2011/28 Heart of Wales Bus & Coach Ltd and Clayton Francis Jones.* 2003/107 *R A Meredith & Son (Nurseries) Ltd.* T/2010/022 *Coachman Travel Ltd & Saunders*. *T/2014/08 Duncan (operator) & Mary McKee (transport manager)*.

SUMMARY OF DECISION

This is an appeal by Xport Transport Ltd against the decision of the Presiding Officer, on behalf of the Department for Infrastructure, to revoke its operator's licence on the findings that it had lost its good repute and lacked financial standing. The Presiding Officer's decision to revoke the operator's licence was challenged on the grounds of procedural unfairness arising from the late disclosure of evidence, illegality and proportionality. The Upper Tribunal found several procedural irregularities in the handling of late evidence and in the decision-making process, leading to the conclusion that the Presiding Officer's decision was "plainly wrong." The case was remitted for re-determination before a different decision maker on behalf of the Department for Infrastructure (NI).

Please note the Summary of Decision is included for the convenience of the reader. It does not form part of the decision. The Decision and Reasons of the Upper Tribunal follow.

DECISION

The decision of the Upper Tribunal is to ALLOW the appeal.

The decision to revoke the Appellant's operator's licence, dated 12 May 2024, is set aside and the matter is remitted for re-determination before a different decision maker on behalf of the Department for Infrastructure (NI). The stay decision, dated 20 June 2024, ceases to have effect.

REASONS FOR DECISION

Introduction

1. This is an appeal to the Upper Tribunal brought by Xport Transport Ltd ("the Appellant"), against a decision of the Presiding Officer ("PO") on behalf of the Department for Infrastructure for Northern Ireland ("the DfI" or "the Department"), dated 12 May 2024. The decision of the PO was to determine that: (i) the operator had breached sections 23(1)(b) and (e) of the Goods Vehicles (Licensing of Operators) Act (Northern Ireland) 2010; (ii) the operator's licence was revoked with effect from 31 May 2024 under s. 24(1)(a) of the Goods Vehicles (Licensing of Operators) Act (Northern Ireland) 2010 on the grounds that it no longer satisfied the requirements to be of good repute and have financial standing as required by s.12A(2)(b) and (c) of the Act; and (iii) directions were made in relation to future applications made by the former transport manager and the current director (see paragraph 34 for further detail).

2. The PO refused to grant a stay of his decision pending the outcome of an appeal to the Upper Tribunal, by decision dated 3 June 2024. Following a renewed application to the Upper Tribunal, a stay was granted by Upper Tribunal Judge Mitchell on 20 June 2024.

3. The Upper Tribunal granted an application by the DVA(NI) to be made Respondent to the appeal. The appeal was considered at an oral hearing, at the Tribunals Hearing Centre within the Royal Courts of Justice, Belfast, on 22 January 2025. The Appellant was represented by Mr D. McNamee, solicitor. The Respondent was represented by Ms A. Jones, BL. The Head of the Transport Regulation Unit for Northern Ireland ("TRU") was present as an observer to the appeal hearing. No party took any objection to his presence.

Factual background

4. The Appellant is the holder of a standard international operator's licence which was granted on 15 December 2017, when the operator's sole director and transport manager ("TM") was Mr B.J. Shields. The licence authorised the use of two vehicles and two trailers. On 13 September 2018, Mr G.S. Carson replaced Mr Shields in both roles.

5. A regulatory audit was conducted in 2022, following four "most serious infringements". The outcome was "unsatisfactory" in three areas. On 4 May 2022, an "in-chambers" meeting was held, and much of the discussion related

to improvements needed in relation to maintenance and drivers' hours compliance. At the conclusion of the meeting, Mr Carson, as director and as TM, assured the DfI that improvements would be made. A formal warning was issued.

6. On 15 January 2023, one of the authorised vehicles, driven by Mr Carson, was stopped and found to have an ineffective speed limiter, and an illegible registration mark. He had driven for 2 hours and 43 minutes without using a tachograph card and had failed to take the required weekly rest. On 22 June 2023, another vehicle was stopped and found to have a defective indicator, a missing sideguard and a missing vehicle registration plate.

7. On 14 September 2023, vehicle PO64 VNS was stopped by the DVSA at a site on the A78 near Newton Stewart, Scotland. It was being driven by Mr L.P. Hughes and was found to have a leaking shock absorber, and damage to the electronic braking system. Mr Hughes said he was working for Xport Transport Ltd, but the vehicle was not authorised on that operator's licence. An expired Operator Licence Identity Disc (expiry date 30 November 2022) which was issued to the operator was in the windscreen of the vehicle. Mr Hughes said he had been employed by Xport Transport Ltd since May 2023, and that he regularly drove this vehicle for them. The tachograph confirmed that he had driven the vehicle regularly since 22 May 2023. He said that "his uncle", Kieran Hughes, "usually" gave him his daily instructions. The tachograph showed that for the period from 17 August 2023 to 14 September 2023, the tachograph card had been removed on two occasions, and the vehicle had been driven while daily rest was recorded. Mr Hughes' driver's tachograph card had not been downloaded for 153 days, the vehicle unit had not been downloaded for 100 days and there were other occasions outside of the 28-day period when Mr Hughes had removed his card, thus concealing periods of driving. He was asked if he was under pressure to complete his work and he replied, "I want to get it done basically". Mr Hughes was reported to the Procurator Fiscal.

8. On 27 October 2023, the DfI received an application to vary the operator's licence by replacing Mr Carson, as director, with Mr K.P. Hughes ("KPH"), the uncle of Mr L.P. Hughes, who was driving vehicle PO64 VNS on 14 September 2023. This change had already been recorded with companies' house as of 1 October 2023. The variation application disclosed convictions for KPH on 6 May 2014 for fraudulent evasion of excise duty and possession of false documentation for which a 6-year custodial sentence had been imposed. KPH also declared a 10-year company director disqualification order commencing in 2013. Mr Carson remained as TM for the operator however, on 5 December 2023, he emailed the TRU stating that he wished to resign as TM on the licence with immediate effect.

9. In February 2024, the DfI asked the DVA to conduct an audit. KPH advised that the company had not been operating since the summer of 2023 so there were no records to be audited. The DVA agreed to postpone the audit. Thereafter, the DfI decided to call a Public Inquiry ("PI") to discuss the compliance issues that had arisen.

10. In preparation for the PI, the DfI wrote to the operator, on 9 February 2024, and requested three months' evidence of financial standing, and compliance documentation covering the period from 1 August 2023 to 31 January 2024. A "propose to revoke" letter was sent on 16 February 2024, in light of the resignation of Mr Carson as TM, seeking either a period of grace or the nomination of a new TM by 8 March 2024. An application was submitted on 20 March 2024 nominating Mr P. McCallen as the new TM for the operator.

11. On 27 March 2024, the DfI sent a call-up letter to the operator, purporting to set out the issues to be determined at the PI, and requesting further evidence in advance of the hearing. It also stated that Mr Carson, the former TM for the operator, had been invited to attend. Annex 4 of the call-up letter set out eight paragraphs of the operator's history commencing with the application to vary the operator's licence (27 October 2023). It detailed: the stop on 14 September 2023; the concern that KPH had been involved in the running of the operation prior to his application and that Mr Carson was a front; the lack of TM; the concerns regarding KPH's conviction; KPH's failure to engage with the DfI in the audit; and KPH's failure to provide compliance information as requested. Annex 5 of the call up letter stated that as "a result of enquiries, the DfI may consider regulatory action necessary" under the following (exactly as presented in Annex 5):

    - *"Goods Vehicles (Licensing of Operators) Act (Northern Ireland) 2010 Section 23(1)(b) - the Department may direct that an operator's licence be revoked, suspended or curtailed (within the meaning given in subsection (9)) for any reasonable cause including that the licence-holder has contravened any conditions attached to the licence, namely notification of events that affect the good repute of the licence holder and transport manager, in particular, convictions or penalties (this includes the issue of a fixed penalty notice or conditional offer).*
    - *Goods Vehicles (Licensing of Operators) Act (Northern Ireland) 2010 Section 23(1)(e) - the Department may direct that an operator's licence be revoked, suspended, or curtailed (within the meaning given in subsection (9)) for any reasonable cause including that any undertaking recorded in the licence has not been fulfilled,* ***namely that vehicles and/or trailers are not kept in a fit and serviceable condition****.*

- *Goods Vehicles (Licensing of Operators) Act (Northern Ireland) 2010 Section 23(1)(e) - the Department may direct that an operator's licence be revoked, suspended, or curtailed (within the meaning given in subsection (9)) for any reasonable cause including that any undertaking recorded in the licence has not been fulfilled,* ***namely that rules on drivers' hours and tachographs are not being observed and proper records kept.***
- *Goods Vehicles (Licensing of Operators) Act (Northern Ireland) 2010 Section 24(1)(a) - The Department shall direct that a standard licence be revoked if at any time it appears to the Department that the applicant no longer appears to satisfy the requirement of section 12A(2)(b), namely to be of good repute as prescribed in* ***The Goods Vehicles (Qualifications of Operators) Regulations (Northern Ireland) 2012 Regulation 5 (1) (a) &(b)***
- *Goods Vehicles (Licensing of Operators) Act (Northern Ireland) 2010 Section 24(1)(b) - The Department shall direct that a standard licence be revoked if at any time it appears to the Department that the transport manager no longer satisfies the requirements of section 12A(3)(a), namely is of good repute as prescribed in* ***The Goods Vehicles (Qualifications of Operators) Regulations (Northern Ireland) 2012 Regulation 13A(1)(b)***
- *Goods Vehicles (Licensing of Operators) Act (Northern Ireland) 2010 Section 24(1)(b) - The Department shall direct that a standard licence be revoked if at any time it appears to the Department that the transport manager no longer satisfies the requirements of section 12A(3)(a), namely is of good repute as prescribed in* ***The Goods Vehicles (Qualifications of Operators) Regulations (Northern Ireland) 2012 Regulation 13A(1)(b)***"

It continued:

"***The Department may also consider disqualification of the partners and Transport Manager under the provisions of****:*

- *Goods Vehicles (Licensing of Operators) Act (Northern Ireland) 2010 Section 25(1) – Where, under section 23(1) or 24(1), the Department directs that an operator's licence be revoked, the Department may order the person who was the holder of the licence to be disqualified (either indefinitely or for such period as the Department thinks fit) from holding or obtaining an operator's licence.*

The Department may also consider Transport Manager repute and disqualification under the provisions of*:*

- *The Goods Vehicles (Qualifications of Operators) Regulations (Northern Ireland) 2012 Regulation 5(1)(b)*

- *The Goods Vehicles (Qualifications of Operators) Regulations (Northern Ireland) 2012 Regulation 15(2).*

The Department may also consider revocation of Operator licences where the applicant is listed as the Transport Manager and repute is deemed to be lost under the provisions of*:*

- *Goods Vehicles (Licensing of Operators) Act (Northern Ireland) 2010 Section 24(1)(b) - The Department shall direct that a standard licence be revoked if at any time it appears to the Department that the transport manager no longer satisfies the requirements of section 12A(3)(a), namely is of good repute as prescribed in* ***The Goods Vehicles (Qualifications of Operators) Regulations (Northern Ireland) 2012 Regulation 13A(1)(b)***"

[pages 37 and 38 of the UT bundle]

12. The operator was warned, in the call-up letter, that a failure to provide the financial standing information requested in February 2024 would be taken into account and that adverse inferences were likely to be drawn. No financial standing information was provided by the operator prior to the PI.

The Public Inquiry

13. The PI took place on 25 April 2024. KPH attended on behalf of the operator, along with Mr McCallen, the proposed TM. They were represented by Ms McCreesh. The former TM, Mr Carson, attended the PI as requested in the call-up letter, along with his solicitor, Mr McNamee.

14. Mr McCallen gave evidence that he had qualified as a TM approximately 18-24 months prior, that he had been designated as TM on an operator's licence authorising three vehicles for the previous 3-6 months and that he had a transport training company. He stated that he was slowly closing the training company, and therefore he would have time to devote to the TM role for Xport Transport Ltd, if approved. He stated that he was aware of the consequences for his repute in the event of regulatory non-compliance.

15. Mr McNamee reminded the PO that Mr Carson had resigned as TM on 5 December 2023 and ceased to be an officer of the company in October 2023. He submitted that the legislation did not allow for a finding of loss of repute or for disqualification in relation to a person who was no longer in post.

16. The PO retired to consider the legislation in more detail. He identified that Regulation 15 of the Goods Vehicle (Qualification of Operators) Regulations (Northern Ireland) 2012 refers to determinations in relation to a person "who is a transport manager". He also identified the case of T/2017/38 *J & K*

Environmental Services Limited and Liliana Manole (No. 2) (followed in T/2018/38 *Steven James Lambie*) where it was held that determinations could not be made against persons who had not been accepted as transport managers on the respective licences. Mr McNamee's submission was therefore accepted. Mr Carson did not stay for the remainder of the PI.

17. KPH then gave evidence that he had not been involved with the running of the company until October 2023 when he became a Director. He stated that Mr Carson resigned as TM in December 2023 as he had "had enough". In respect of the statement made by his nephew, Mr L.P. Hughes, who suggested that he was involved in allocating the jobs, KPH stated that his nephew had never worked for the company. He said that Xport Transport Ltd had not been trading for the previous three months (i.e. from approximately January 2024). He explained that a vehicle had been added to the authorisation on the operator's licence in March 2024 but it had not been used pending the appointment of a new TM. KPH stated that maintenance providers for the operator's vehicles and a plan for tachograph analysis were in place.

18. KPH's solicitor, Ms McCreesh, submitted that his convictions were not something that could be taken into consideration in respect of good repute as convictions of company directors were excluded by the 2010 Act. Furthermore, as it was a spent conviction from a court in England & Wales, it could not therefore be considered under the NI legislation. She submitted that it would be wrong to interfere with judicial discretion which had determined that a ten-year company director disqualification was appropriate penalty for the offence committed, and this should not therefore be taken into account in relation to repute either.

19. No evidence in relation to financial standing had been submitted so the PO directed that this be sent to him within seven days of the date of the PI. A copy of the company director disqualification order was also requested within the same timescale. Ms McCreesh asked the PO if there was anything further that he sought her representations on, and the PO said that he had completed his list. He closed the hearing, stating that he would prepare a written decision.

After the PI

20. As outlined by the PO in his written decision, at paragraph 27:

> *"After the inquiry a member of staff from the Transport Regulation Unit who had been present during the hearing pointed out to me that there was evidence on file to show that payments for an MOT test (fail and pass) on 14 and 17 May 2024 were paid by a debit card in the name "KP Hughes". They had wrongly assumed that this evidence had been included in the public inquiry bundle. I decided that this evidence may be relevant to whether* [*KPH*] *had been involved in Xport Transport Limited prior to October 2023 so I directed that the information be relayed to the representative to enable comment to be made."*

21. Subsequent correspondence between the PO and Ms McCreesh is provided within the papers in this matter. The correspondence started on 25 April 2024 at 4.14pm (shortly after the conclusion of the PI), when the PO emailed Ms McCreesh to provide details of the evidence which had been brought to his attention after the PI. He stated in the email that it was fair to allow the Appellant to comment on the evidence before proceeding to make his decision, and invited submissions by 1 May 2024.

22. On 26 April 2024, at 10.33am, Ms McCreesh replied to say that she was concerned that the material had not been presented in the PI bundle, or during the hearing itself. She stated that the PO should not seek further evidence after the conclusion of a PI. She asked who had requested a search of the TRU system after the PI had concluded and who had made the decision to communicate the results of the search (i.e. finding the two payments) to the PO. She submitted that the provision of material to the PO in this manner rendered the PI unfair to the operator and she was therefore inclined to advise her client not to comment on the fresh evidence. She also sought details of all communication between the PO and the TRU in relation to the PI.

23. At 3.28pm on the same day, the PO responded that there was nothing to prevent him from making his own enquiries or receiving additional information providing it was shared with the operator for comment before any decision was made. He explained that as no skeleton argument had been provided prior to the PI, he was unaware of the issues that were likely to arise at the hearing. It only became clear after the PI that KPH denied involvement and disputed the statement made by his nephew to the traffic examiner. At 4.19pm, and again at 4.44pm, Ms McCreesh emailed the PO stating that any evidence to be relied upon should be disclosed in advance of the PI, and members of the TRU who are present at the PI for the purposes of "training" should not involve themselves with the running of the PI or the provision of evidence. She stated in the second email that she would take instructions from her client and provide comment, as soon as he was available to do so.

24. On 30 April 2024, at 9.45am, the PO emailed Ms McCreesh to allow additional time to provide comments on the new evidence. In addition, the PO reminded Ms McCreesh that she should provide the evidence of financial standing as agreed at the conclusion of the PI. He also stated that as she had not addressed the PO on the question of revocation and disqualification at the PI, he would accept representations on these matters, if she wished to make any.

25. At 9.58am on the same day, Ms McCreesh emailed the PO to highlight her surprise at the mention of revocation and disqualification, it having not been raised previously at the PI. She stated that this caused her to believe that the fresh evidence was having a significant impact on the decision of the PO.

26. On 2 May 2024, Ms McCreesh made representations in respect of the two MOT payments, stating that KPH was simply helping Mr Carson who was not available at that time and thus unable to pay for the tests. These were one off offers of assistance to help Mr Carson, and he was refunded for the payments, therefore the new evidence did not support any suggestion that the Appellant was involved in running the operation. She also made representations in respect of revocation and disqualification, highlighting that tenders had gone out to attract work for the operator. She submitted that there were two employees who relied upon the operator for an income and two contracts had been secured in order to bring in that income. She submitted that revocation was a disproportionate response as KPH had put time and money into the business to make sure it operated compliantly. She also provided evidence of financial standing.

27. On 3 May 2024, the PO, having considered the financial standing evidence was insufficient, responded with a request for bank statements covering 1 January 2024 to 31 March 2024. The bank statements were provided by email dated 10 May 2024, with an explanation that as the company had not been operating during this period, there were limited funds available in the company bank accounts.

The Presiding Officer's findings

28. On 12 May 2024, the PO signed off his written decision. He found that the operator had a "poor" compliance history, on the basis of: the "most serious" infringements and the unsatisfactory audit in 2022 which led to a final warning; three drivers' hours infringements in 2023; the resignation of Mr Carson as TM in December 2023, with no replacement put forward until after a "propose to revoke" letter was sent by the DfI; and the compliance documentation having not been provided as requested in the letter of 9 February 2024.

29. With reasons, he found that KPH's conviction could be taken into account in determining the operator's good repute, provided it was not a spent conviction, which he found it was not. He found that KPH, as an individual, was not of good repute, discounting (with reasons) the suggestion that a conviction from England and Wales could not be considered in Northern Ireland. He found it was not disproportionate for the presumption against good repute to remain in place given the nature of the offences, the "substantial" period of time before the offences are spent and having not been made aware of any circumstances which merited the opposite view being taken.

30. The PO found that vehicle PO64 VNS, which was stopped on 14 September 2023, was being operated by Xport Transport Ltd from 22 May 2023 (per tachograph evidence), and that KPH had paid for the MOT test for that vehicle. L.P Hughes' driver's card had not been downloaded since 14 April 2023 and the vehicle unit had not been downloaded for 100 days, which were "serious" regulatory failures risking road safety.

31. He determined that Mr Carson was not acting as a "front" for KPH, but KPH was involved in the business to some degree before October 2023. He was uncertain of the precise nature of KPH's role. In making this finding, the PO relied upon the comment of L.P. Hughes who stated that he got his work instructions from KPH (when he was stopped on 14 September 2023), as well as the evidence of the two MOT payments.

32. Accepting that KPH's company director disqualification had expired, he determined that he could take the disqualification into account when considering the repute of the operator. He found that KPH did not present himself favourably during the PI as he was not open in his communication with the PO and did not present as a person who would work cooperatively with the DfI.

33. The PO again noted that no evidence of financial standing had been presented prior to, or on the day of, the PI despite one request and one reminder. He had allowed further time to provide the information, and he was presented with evidence of two payments made by KPH into the company account on 5 January and 5 February 2024. He found this not to be acceptable evidence of financial standing, and requested, once again, that bank statements for the three months covering 1 January 2024 to 31 March 2024 should be sent to him. These bank statements were submitted on 9 May 2024, showing an average balance of £1,146 (the legislation requires an average balance of £12,500 to demonstrate financial standing). In addition, the two payments into the company account (previously sent) did not appear on the bank statements and over £3,500 had been spent on fuel. The PO found that this contradicted KPH's assertion in evidence that the business had not been operating since the

summer of 2023. The PO did not offer a period of grace to establish financial standing, as requested by McCreesh, as he found there was insufficient information to allow him to do so (T/2014/08 *Duncan (operator) & Mary Mckee (transport manager*).

The Presiding Officer's decision

34. With consideration of these findings, the PO went on to make the following determinations, as outlined at paragraph 46 of his written decision:

    (i) The "*infringements and offences detailed in the documentation and outlined above and the failure to notify the Department of them lead to a breach of Section 23(1)(b) and (e) of the Goods Vehicles (Licensing of Operators) Act (Northern Ireland) 2010*"
    (ii) The PO revoked the operator's licence with effect from 31 May 2024 under section 24(1)(a) of the Goods Vehicle (Licensing of Operators) (Northern Ireland) Act 2010 on the grounds that the operator no longer satisfied the requirements to be of good repute and to have financial standing as required by s.12A(2)(b) and (c) of the Act.
    (iii) The PO determined not to disqualify KPH from holding a licence in the future. He directed that in the event of such an application, this decision would be brought to the DfI's attention as KPH's conviction remained a matter of concern.
    (iv) The PO directed that a copy of the decision was placed on the file under the name of Mr Carson, former TM, and that the authorities in England and Wales were alerted to his name, so that action could be taken in relation to any licence he held in that area.

The appeal

35. The Appellant lodged an appeal against the decision of the PO, dated 31 May 2024. Prior to the date of the appeal hearing before the Upper Tribunal, the Appellant submitted a skeleton argument (dated 6 January 2025) which set out his finalised grounds of appeal. These grounds were expanded upon during the appeal hearing and can be summarised as follows:

    (i) The PO permitted a procedural irregularity to take place by permitting a member of the TRU staff present at the hearing to provide him with further evidence, after the PI, which was not included in the bundle. The operator's representative was unable to see how this evidence was presented to the PO and was unable to address it as it had not previously been disclosed. This constitutes a breach of the principle of open justice and renders the decision of the PO unlawful.

(ii) The PO erred in law by premising his decision to revoke the operator's licence upon a finding of the operator's loss of repute, rather than applying the test in *Bradley Fold Travel Ltd & Peter Wright v Secretary of State for Transport [2010] EWCA Civ. 695*.

(iii) The PO did not consider the impact of revocation on the company, its employees or its customers, and therefore did not assess the fairness or the proportionality of a decision to revoke the licence.

36. The DVA(NI), represented by Ms Jones, submitted a skeleton argument in response, which reflects her oral arguments presented on the day of the appeal hearing.

The Approach of the Upper Tribunal

37. As to the approach which the Upper Tribunal must take on an appeal such as this, it was said, in the case of *Fergal Hughes v DOENI* & *Perry McKee Homes Ltd v DOENI* [2013] UKUT 618 AAC, NT/2013/52 & 53, at paragraph 8:

"There is a right of appeal to the Upper Tribunal against decisions by the Head of the TRU in the circumstances set out in s. 35 of the 2010 Act. Leave to appeal is not required. At the hearing of an appeal the Tribunal is entitled to hear and determine matters of both fact and law. However, it is important to remember that the appeal is not the equivalent of a Crown Court hearing or an appeal against conviction from a Magistrates Court, where the case, effectively, begins all over again. Instead, an appeal hearing will take the form of a review of the material placed before the Head of the TRU, together with a transcript of any public inquiry, which has taken place. For a detailed explanation of the role of the Tribunal when hearing this type of appeal see paragraphs 34-40 of the decision of the Court of Appeal (Civil Division) in Bradley Fold Travel Ltd & Peter Wright v Secretary of State for Transport [2010] EWCA Civ. 695. Two other points emerge from these paragraphs. First, the Appellant assumes the burden of showing that the decision under appeal is wrong. Second, in order to succeed the Appellant must show that: "the process of reasoning and the application of the relevant law require the Tribunal to adopt a different view". The Tribunal sometimes uses the expression "plainly wrong" as a shorthand description of this test.'

38. At paragraph 4, the Upper Tribunal stated:

"It is apparent that many of the provisions of the 2010 Act and the Regulations made under that Act are in identical terms to provisions found in the Goods Vehicles (Licensing of Operators) Act 1995, ("the 1995 Act"), and in the Regulations made under that Act. The 1995 Act and the Regulations made under it, govern the operation of goods vehicles in Great Britain. The provisional conclusion which we draw, (because the point has not been argued), is that this was a deliberate choice on the part of the Northern Ireland Assembly to ensure that there is a common standard for the operation of goods vehicles throughout the United Kingdom. It follows that decisions on the meaning of a section in the 1995 Act or a paragraph in the Regulations, made under that Act, are highly relevant to the interpretation of an identical provision in the Northern Ireland legislation and vice versa."

39. The task of the Upper Tribunal, therefore, when considering an appeal from a decision of the DfI in Northern Ireland, is to review the information which was before it, along with its decision based on that information. The Upper Tribunal will only allow an appeal if the appellant has shown that "the process of reasoning and the application of the relevant law require the tribunal to take a different view" (*Bradley Fold Travel Limited and Peter Wright* v. *Secretary of State for Transport* [2010] EWCA Civ 695, [2011] R.T.R. 13, at paragraphs 30-40). Therefore, the approach of the Upper Tribunal is as stated by Lord Shaw of Dunfermline in *Clarke v Edinburgh & District Tramways Co Ltd* 1919 SC (HL) 35, 36-37, that an appellate court should only intervene if it is satisfied that the judge (in this case, the decision of the PO on behalf of the DfI) was "plainly wrong".

ANALYSIS

Ground of appeal (i): Procedural irregularity

40. The Appellant's primary ground of appeal, and the one on which the greatest focus was placed at the appeal hearing, asserts that the PO erred in law by allowing a procedural irregularity to take place in making his decision. In particular, the Appellant asserts that it was procedurally unfair for the PO to receive evidence from a member of the TRU after the conclusion of the PI, which had not been disclosed prior to, or during, the PI and which was used in evidence in making his decision. The events that took place following the PI are set out above, at paragraphs 20-27 of this decision.

The Law and Procedure for a Public Inquiry

41. The DfI is one of eight government departments within the Northern Ireland Executive, which amongst other things, has responsibility for road transport. As

a Department, it implements the 2010 Act, the primary source of legislation that regulates the transport industry. The TRU is part of the DfI with responsibility for the licensing and regulation of goods vehicle operators in Northern Ireland under the 2010 Act. Alongside the DVA (DVSA in Great Britain), which has the power to stop, inspect and take enforcement action against vehicles and operators, the TRU acts to advise, investigate and if necessary, take regulatory action against operators and transport managers who do not ensure compliance with the strict regulatory requirements.

42. Section 32(1) of the 2010 Act provides that the DfI shall hold an inquiry (also known as a public inquiry) as it thinks necessary for the proper exercise of its functions under the 2010 Act. Section 32(3) provides that, subject to any provision made by regulations, "*any inquiry held by the Department for the purposes of [the 2010 Act] or [Regulation (EC) No. 1071/2009] shall be held in public*." The TRU has the authority to call an operator or transport manager to an inquiry, or to a more informal "in-chambers" meeting in order to hear evidence and to consider submissions on a regulatory issue, before making a decision, for example, to grant or refuse a licence application, or to take regulatory action against an existing licence holder.

43. Regulation 18 and Schedule 3 of the Goods Vehicles (Licensing of Operators) Regulations (Northern Ireland) 2012 (the "2012 Regulations") make further provision for the arrangements of a PI. The Schedule 3 provisions outline: the notice procedure prior to an inquiry (paragraphs 1 and 5); those who are entitled to admission to an inquiry (paragraph 2); those who are entitled to appear at an inquiry (paragraph 3); and the procedure at the inquiry, including the rights of any person who appears or who is present at an inquiry (paragraph 4).

44. Paragraph 2(1) of Schedule 3 to the 2012 Regulations reiterates that "*an inquiry shall be held in public*", subject to specified circumstances as set out in paragraph 2(2), namely the disclosure of personal, financial or commercially sensitive information, or in other exceptional circumstances where it is just and reasonable to direct that the whole or part of the inquiry is held in private. Under paragraph 4(6), the DfI "*may require any person appearing or present at an inquiry who, in its opinion is behaving in a disruptive manner to leave and may refuse to permit that person to return*."

45. Paragraph 3 makes provision as to who is entitled to "appear" at an inquiry, and this is dependent upon the type of matter to be dealt with. A licence applicant, an objector and someone seeking to make representations can "appear" in a licence application inquiry (paragraph 3(1)). The licence-holder and/or person who has requested an inquiry can "appear" where the DfI are holding an inquiry to consider exercising its powers under sections 23, 26 or 27 of the 2010 Act

(see paragraphs 3(2) and 3(3)). A TM is entitled to "appear" in specified circumstances where his/her good repute is in issue (paragraph 3(4)). Notably also, paragraph 3(5) states that *"[a]ny person may appear at an inquiry at the discretion of the Department*." Any person entitled or permitted to "appear" at an inquiry can represent themselves, or be represented by a solicitor or barrister, or, at the discretion of the DfI, by "any other person" (paragraph 3(6)).

46. Paragraph 4 outlines, amongst other things, the evidence that can be considered at an inquiry. Paragraph 4(2) provides that anyone entitled to "appear" at an inquiry may give evidence, call witnesses, cross examine witnesses and address the DfI both on the evidence and generally on the subject matter of the proceedings. Such activity "*by other persons appearing at the inquiry shall be at the Department's discretion*" (paragraph 4(3)). By virtue of paragraph 4(4), "*any person present at an inquiry may submit any written evidence or other matter in writing before the close of the inquiry*." The DfI may refuse to permit the giving, calling, cross examination or presentation of evidence which it considers to be "irrelevant, repetitious, frivolous or vexatious" (paragraph 4(5)). The DfI "*shall not take into account any written evidence or other matter in writing received from any person before an inquiry opens or during any inquiry unless it discloses it at the inquiry*" (paragraph 4(8)).

47. Based on the wording of paragraphs 3 and 4, a person "present" at an inquiry, is different to a person "appearing" at an inquiry. A person appearing has an interest in the outcome of the case, for example an operator, an applicant, an objector or a TM. A person "present" is, by implication, anyone who has been admitted to the public inquiry under paragraph 2. Schedule 3 permits evidence (in a prescribed form and in a prescribed manner) from anyone appearing or present at an inquiry, at the discretion of the DfI.

48. Paragraph 94 of the "*TRU Practice Guidance (Statutory Document No 9) – Principles of Decision Making and the Concept of Proportionality*" ("Statutory Document No.9"), outlines the role of the PI clerk:

> *"The role of a public inquiry clerk (caseworker) is to provide administrative support to the Department to allow it to carry out its statutory duties in relation to public inquiries. They are not responsible for identifying which operators/applicants should be called to public inquiries nor are they responsible for the decisions taken at public inquiries but will assist the Department with general enquiries. If a caseworker is in any doubt as to the presiding officer's intentions, they should make the appropriate enquiries of that presiding officer." (Version 2.0 Updated February 2024)*

49. Several Upper Tribunal cases have considered the late disclosure (and non-disclosure) of evidence to an operator who has been called to a PI. It is settled law, based upon the principles of natural justice and supported by paragraph 4(8) of Schedule 3 to the 2012 Regulations, that material to be relied upon by a decision maker must be disclosed to the operator in advance of the PI so that the operator understands the case it faces and has an opportunity to prepare accordingly. Thereafter, the same material should be raised during the PI to allow the operator to comment upon it (2004/407 *PF White-Hide*). In 2001/39 *BKG Transport,* highlighting the "need for careful housekeeping of documents", the Upper Tribunal acknowledged, at paragraph 6:

> *"It would be impracticable for a Traffic Commissioner to have to attempt to disclose everything that he has ever seen in relation to a particular operator… We agree that it is at the stage at which a decision is taken to refer an operator to a public inquiry that a line must be drawn. What the Traffic Commissioner is then required to do is to identify the evidence that is being relied upon at the public inquiry and to ensure that the operator is given notice so that he can properly deal with it, to avoid surprises."*

50. This process was repeated in NT/2014/19 *OC International Transport Ltd v DOENI*, a case which involved the failure to disclose all the material evidence being considered by the decision maker, prior to the commencement of the PI. The non-disclosure became apparent during the PI and the PI was adjourned to allow for the evidence to be considered. Nevertheless, some evidence relied upon by the decision maker was still not disclosed and the Upper Tribunal found that this amounted to a procedural irregularity. The Upper Tribunal stated at paragraphs 9 and 10:

> 9. *"… In this case, the principle is that so far as is reasonably possible, an operator called up to a public inquiry should be told about all the material evidence that the decision-maker may reasonably consider to be relevant, and should be given an appropriate opportunity to consider, prepare and present a response to it - at a hearing, should they wish. If information that has a reasonable prospect of becoming relevant to the outcome becomes available at the last minute, it should be disclosed at the earliest opportunity, and time to consider it, or an adjournment, should be offered. This rule applies even if, in the event, the information does not attract adverse weight. If an operator has been put on the back foot by the surprise production of new evidence part way through the hearing, an unfortunate sense of unfairness and injustice may arise – even if the information happens to be available, somewhere on the internet.*

> *10. It may well be that the Department has a wealth of information, and it is not always clear what is, and is not, likely to be relevant. But in putting the brief together and giving the person(s) presiding the information that they need in order to conduct a robust and thorough public inquiry, the general rule should be - if something is worth telling the decision-maker about, then it is worth telling the operator too. In the present case, the impression of "rabbits out a hat" is hard to discount."*

51. The case of T/2012/34 *Martin Joseph Formby t/a G&G Transport* dealt with the situation where relevant information came to light after the PI. In this case, the Deputy Traffic Commissioner ("DTC") had requested information from the operator, which was not forthcoming, therefore the DTC did his own research after the PI and found a media report which was relevant to the matter in issue. The Upper Tribunal held that the DTC was correct to disclose the media report to the operator, to invite comments on it and to have told the operator that he was entitled to have the PI re-opened so that he could give his explanation in person. The PI was re-convened in *Formby*, after which the DTC made another enquiry that produced further evidence. The DTC did not give the operator a chance to comment on this further evidence. The Upper Tribunal found that the DTC should have done so but dismissed the appeal on the basis that the outcome of the case was unlikely to have differed in the particular circumstances of this case.

52. Equally in T/2013/38 *Hobart Court Property Management Ltd v John Kent and Valerie Kent*, the Traffic Commissioner, having made his own enquiries, was given information that had a significant impact upon his decision but which he had not put to the parties to obtain their comments on it. The Upper Tribunal stated that allowing the operator the opportunity to comment on material and the opportunity to request that the PI is re-convened is the minimum required for natural justice to be done.

53. At the conclusion of the PI, in *Balwant Singh Uppal t/a Professional Chauffeuring Services and PCS Limos Limited* [2014] UKUT (AAC), the operator was allowed seven days to provide any documentary evidence he wanted the DTC to consider, despite having not presented it at the PI as requested to do. The evidence was provided, and the DTC made his decision. The Upper Tribunal determined that the DTC was correct to allow additional time for the operator to provide his documentary evidence, even though it had not been presented on the day of the PI as it should really have been. It continued, at paragraph 20:

> *"20…..The Deputy Traffic Commissioner proceeded to analyse the documents provided and he reached conclusions adverse to both Appellant as a result of that analysis. He then went on to found his decision on those conclusions without giving the Appellants an opportunity to challenge or explore his conclusions. The question is whether it was right to proceed in that way. We are satisfied that it was not and, indeed, that the Deputy Traffic Commissioner was plainly wrong not to invite the Appellants to comment on, challenge or explore what should have been provisional conclusions.*
>
> *21. In our view it is a simple matter of fairness. It seems to us that the Appellants ought to have had an opportunity to test the validity of the Deputy Traffic Commissioner's conclusions."*

54. The Upper Tribunal went on to clarify that there is no difference between cases where the TC is making a conclusion on new material acquired through his own enquiries or on the basis of material provided by the Appellant. The key distinction is the making of a conclusion which is "*adverse*" to the operator, in which case:

> *"…no firm conclusions should be reached without giving the person who may be adversely affected an opportunity to comment on and/or challenge what should, at that stage, be no more than provisional conclusions. If necessary, the Traffic Commissioner should be prepared to offer to re-convene the Public Inquiry."* (at paragraph 24)

The submissions

Accepting new evidence

55. Mr McNamee submits, on behalf of the Appellant, that it amounts to a procedural irregularity for the evidence of the two payments made by KPH on 14 and 17 May 2023, relating to two MOTs on the operator's vehicles, not to have been disclosed in advance of the PI. Ms Jones suggests that it is acceptable for the PO to consider new evidence, citing the cases of *Formby* and *Hobart* in support of this submission.

56. The starting point is that all material evidence that a decision maker may reasonably consider to be relevant to the issues in a PI, should be provided to the operator in advance of the PI. This requires careful consideration of the regulatory issues to be discussed, and the evidence collated by the investigators in relation to those regulatory issues. The evidence should be carefully itemised in order to assist with the disclosure process (*BKG Transport*).

We agree that the evidence of these two payments should have been provided in advance of the PI, as the extent of KPH's involvement in the operator company was always in question. A failure to disclose evidence relied upon by the decision maker may amount to a procedural irregularity which results in the decision being set aside (*OC International*). However, we are mindful of the comment in *BKG Transport* that it would be impracticable for a Traffic Commissioner to disclose everything that he has ever seen in relation to a particular operator. Oversights can occur.

57. Mr McNamee continued that where information is obtained after the PI concludes, the operator is left in a position of uncertainty where he can never be sure when the inquiry ends. We note firstly that paragraph 4(4) of Schedule 3 to the 2012 Regulations provides that any person present at an inquiry may submit written evidence or other written matter "*before the close of the inquiry*". Nevertheless, the Upper Tribunal precedents acknowledge that new information that comes to light after the conclusion of a PI, including information which has been independently researched by the decision maker (see *Formby* and *Hobart*) or that arrives late from the operator, can be admitted for consideration by the decision maker where the correct procedure is followed. This follows the civil law principle that a court or tribunal retains jurisdiction over a case until its decision disposing of the case has been communicated to the parties (promulgated). Until then a decision maker may amend, revisit or withdraw their decision (see for example *Patel v Secretary of State for the Home Department* [2015] EWCA Civ 1175 at [50]). The ability to, exceptionally, consider late evidence is particularly important in an inquisitorial jurisdiction which aims to uncover the correct answer and therefore all available and relevant evidence should be considered before a decision is reached. The late evidence may be of benefit to the operator's case, hence it would be an injustice not to receive it. In T/2014/59 *Randolph Transport Ltd & Catherine Tottenham*, for example, when undisclosed evidence was brought to the decision maker's attention following the conclusion of the inquiry, but prior to her decision being made, she disclosed it and re-convened the inquiry, so that all parties had the opportunity to comment on the late evidence before reaching her final decision in the matter.

58. The key point is the manner in which late and/or undisclosed evidence is managed by the decision maker. The overarching theme within the authorities is one of fairness to the operator. If information that has a reasonable prospect of becoming relevant to the outcome decision becomes available immediately before or during the PI (i.e. at the last minute), it should be disclosed to the parties at the earliest opportunity (either before or during the inquiry) (*OC International*). This accords with paragraph 4(8) of Schedule 3 to the 2012 Regulations which provides that any evidence received "from any person" before an inquiry opens or during any inquiry, shall not be taken into account by

the decision maker "unless it is disclosed at the inquiry." The authorities take this further and state, quite appropriately, that upon disclosure, the operator should be offered time to consider the new evidence (*OC International*). This could take the form of a break in the hearing, or it could be an adjournment of the inquiry to another date, depending upon the nature and amount of the material disclosed. The operator can comment on the new material at the continuation of the PI whether that is later on the same day or on a different date.

59. Where new evidence is uncovered after the conclusion of the inquiry, and falls to be disclosed, the decision maker should form a preliminary conclusion on its relevance to the case. Where the preliminary view is potentially adverse to the operator, the material must be disclosed to the operator for comment (*Singh*). The decision maker's preliminary conclusion must also be set out when disclosing the material so that comment can be invited, not just on the material itself, but on the preliminary view taken on it by the decision maker (*Singh*). A reasonable period of time should be permitted for the operator to consider it and respond. In addition, the decision maker should offer to re-convene the PI in case the operator would prefer the opportunity to present any representations in person rather than on paper (*Formby*). If the offer is accepted, this should be acknowledged by the decision maker, and a date set for the re-convened PI. The decision maker may, of his/her own volition, direct that the PI will be re-convened if he/she feels that the material is such that requires a discussion rather than a one-way stream of written comment. Where the decision maker forms the preliminary view that the material is not, or not likely to be, adverse to the operator, the authorities suggest it does not have to be disclosed, but he/she may consider it appropriate to disclose the information in any event, so that the operator is aware that the information is part of the evidence to be taken into account, and that it was, in fact, taken into account.

60. In this case, the PO received information, that he considered to be relevant to the outcome decision, after the PI had concluded. In line with the earlier authorities, upon receipt of the new evidence in this case, the PO disclosed the material to the operator in a timely manner, and he correctly sought comments on it. However, despite a flurry of correspondence between the PO and the operator's representative, he did not outline his preliminary conclusion on the relevance of the material when he presented it for comment. As it happens, Ms McCreesh addressed what she believed to be the relevance of the material in her representations dated 2 May 2024, and by chance this aligned with the PO's undisclosed view on it. However, an unrepresented operator may not be so astute. By failing to state the PO's preliminary opinion on the material, an unrepresented operator may find themselves at a disadvantage which creates a sense of unfairness.

61. In addition, the PO did not offer the Appellant the opportunity to reconvene the PI (*Formby*). It does not matter that Ms McCreesh did not request it – what matters is that the decision maker makes the offer. Again, an unrepresented operator may not be aware that an offer to re-convene the PI is an important procedural part of the process where late evidence comes to light, which puts him/her at a disadvantage, and again creates an unfairness.

Accepting new evidence from a member of the TRU

62. Continuing with this ground of appeal, Mr McNamee's most significant concern is that the new evidence came from a member of the TRU who was acting in the role of PI clerk. Citing paragraph 94 of Statutory Document No 9, he argues that the role of the clerk is to provide "administrative support" and not to involve him or herself with the evidence in the case. He submits that members of the TRU, in any capacity, particularly that of the PI clerk performing an administrative role, should not think that they can interfere with the judicial process. He considers that no one should approach the decision maker outside the PI, in a situation where the conversation cannot be heard - members of the public do not approach the decision maker after the hearing, therefore members of the TRU should not do so either. He specifically argues that the PI clerk should be independent from the investigation so that they will not be tempted, knowing the evidence and having an interest in the case, to interfere with the evidence and/or the decision maker. Mr McNamee also took issue with the identity of the person supplying the information to the PO being withheld (see the written communication between the parties outlined above at paragraphs 21 to 27).

63. Ms Jones agreed that the role of the PI clerk is one of a caseworker providing administrative support, at the inquiry, to the PO as decision maker on behalf of the DfI. Ms Jones cited the case of *Randolph Transport Ltd*, within which (at paragraph 20) the Judge commended the diligence of a member of TRU staff in bringing information to the attention of the decision maker so that she would have full knowledge of the relevant facts. This, Ms Jones suggests, supports the process adopted by the PO in accepting the information provided by the TRU staff member who was present during the PI and who became aware of information of relevance to the issues in this matter. She also submits that the PO did not deliberately conceal the identity of the staff member who had provided him with the evidence.

64. Returning to the PO's written decision, he states at paragraph 27 of his written decision that "*after the inquiry a member of staff from the Transport Regulation*

Unit who had been present during the hearing" highlighted the evidence on file that had not been disclosed. In a subsequent written statement (dated 16 December 2024) which was prepared for the purpose of this appeal, he confirmed that he had not disclosed the identity of this person in his written decision for anonymity reasons. In the same statement he confirmed that the staff member he was referring to was acting in the capacity of PI clerk at the inquiry. He further states, *"[p]ublic inquiry clerks are responsible for compiling the bundle for the hearing and have access to the online document management system. It was the clerk in this case who thought that he had included the piece of information in the bundle and brought it to my attention when he realised he had not."* The PO confirmed in his decision that the information had simply been handed over, with no conversation about the facts of the case (see paragraph 27 of the PO's written decision and his statement dated 16 December 2024). The PO, having disclosed the material to the operator, then invited comment on it before drawing conclusions and utilising those conclusions in his decision. He did not disclose to the operator that the evidence had been provided by the PI clerk until the decision was appealed.

65. While all material should be disclosed prior to the inquiry starting, it may be possible, as occurred in this case, that a new piece of evidence arises late in the proceedings (or the realisation that an existing piece of evidence has been omitted). Unlike the previous authorities, which dealt with the situation where new evidence came to light due to the decision maker's own enquiries, this new evidence came from the PI clerk, an employee of the regulatory body that called the operator to the inquiry. Notably in *Randolph Transport Ltd*, the late evidence was identified by a member of TRU staff, who was not the PI clerk but having heard about the inquiry while in the office, identified some details of relevance and brought them to the attention of the decision maker after the PI had concluded. The Upper Tribunal made no criticism of the late evidence being provided by a member of the regulatory body, and as stated by Ms Jones, openly commended his diligence. Nevertheless, this member of staff had not been present at the inquiry nor had they been the PI clerk.

66. It is clearly stated within Statutory Document No 9 that the PI clerk provides "administrative" support (paragraph 94). "Administrative" tasks, as outlined in the dictionary, typically relate to the management of a business, organisation or activity. In the PI context, this would amount to, for example, dealing with matters such as checking the identity of those appearing at the inquiry, collecting any documentation the appellant (or others) has been asked to bring to the inquiry and giving it to the decision maker, announcing the case, and recording proceedings. As outlined by the PO, it is the PI clerk who collates the papers to create the PI brief, and this has traditionally been the clerk's job. Consequently, the PI clerk will be familiar with the issues and evidence in the

case, and he/she will naturally be the person present at the inquiry who is most likely to notice if something has been missed. While the creation of a PI brief could be considered administrative in nature, the task of a PI clerk identifying missing evidence and presenting it to the PO, does not naturally align with an "administrative" role. Nevertheless, having noticed that the evidence has been missed, the PI clerk is obliged, in the interests of justice, to present it to the decision maker for consideration. This should take place openly within the duration of the inquiry so that everyone present in the inquiry can see what has happened, and hear the conversation when the evidence is handed over (in line with paragraph 4(4) of Schedule 3 to the 2012 Regulations).

67. If the late identification of missed evidence occurs outside the open forum of the PI itself, it may create the impression that the PI clerk (and/or the TRU staff) is surreptitiously interfering with the evidence and/or the decision-making process. It is important that an operator feels that his regulatory matters have been addressed openly and fairly, and that the decision is that of the decision maker alone, without any undue interference from the investigators. There should be a clear delineation between the TRU staff members (especially the TRU case investigator) and the decision maker, in order to maintain public and operator confidence in the regulatory regime.

68. We find that nothing untoward in fact took place in this case, as evidenced by the full disclosure made by the PO in his written decision and as clarified in his statement. However, it is somewhat problematic that the PO did not openly state at the outset that it was the PI clerk who provided him with the information and instead implied that it was an anonymous member of staff from the TRU. This is significant as the TRU is the regulatory body that calls the operator to the inquiry and has an underlying interest in the case. While no names needed to be disclosed, this ambiguity created an unnecessary air of mystery. According to paragraph 4 of Schedule 3 to the 2012 Regulations, evidence should not be accepted by the decision maker after the close of the inquiry. That must be the starting point. However, the authorities have found this to be acceptable, in exceptional circumstances, where the evidence is of relevance to the case and the correct disclosure process is followed. We take no issue with the receipt of the late evidence per se, as it was relevant to the issues in this case. However, it is paramount that in the interests of open justice, the decision maker candidly discloses how the information came to his/her attention and by whom. We find that the failure to openly disclose who had provided the information, coupled with the receipt of that information outside the open remit of the inquiry itself and the procedural irregularities in the disclosure process, gives rise to a perception of unfairness overall.

69. For this reason, it is our view, in agreement with Mr McNamee, that any member(s) of the TRU who has(have) been involved in the investigation and/or preparation of a particular case should not be appointed as the PI clerk for that inquiry. The PI clerk appointed for an inquiry should be independent of the case, unless exceptional and openly disclosed circumstances arise (for example, the TRU is short on staff, or the planned PI clerk cannot attend due to illness). If the PI clerk finds themself in the position where they, after *independently* collating the papers for the PI brief, notice some missing evidence and bring it to the attention of the PO during the PI, there is a reduced risk of actual or perceived impropriety. By being independent of the case, the PI clerk is not taking a view on the evidence or interfering with it, other than noting that something the PO should have seen as part of the brief has been missed. An independent PI clerk should also alleviate any concern that a decision maker is behaving in an unfair manner, as the only discussions to be had between the independent PI clerk and the PO will simply be those that arise in relation to the basic administration (management) of the PI itself; independence from the case means that even the disclosure of missing evidence does not require a discussion of the facts. By separating the investigator(s) from the administrators, the PI clerk in the PI process will be more closely aligned with the clerk of a court or tribunal, who has no connection with the case being heard.

70. Ultimately, in this case, the PI clerk, who may or may not have been involved in the investigation of this case, brought evidence of potential relevance, to the attention of the PO as decision maker after the PI had concluded. Overall, we find that the PO permitted three procedural irregularities to take place in the handling of the late evidence in this case, namely: failing to outline his preliminary conclusion on the new evidence when inviting comment on it; failing to offer to re-convene the PI in light of the new evidence which was disclosed late; and receiving evidence outside the open forum of the inquiry, from an undisclosed member of the TRU. As the late evidence formed a significant part of the PO's ultimate decision in this matter, we find the unfairness created by the combination of these irregularities breaches the principles of natural justice such that the decision of the PO is rendered "plainly wrong".

Grounds of appeal (ii) and (iii): Revocation of the operator's licence

71. Mr McNamee, on behalf of the Appellant, submits that the PO erred in his decision to revoke the operator's licence in two ways. Firstly, he submits that the PO erred in his assessment of the operator's loss of repute, and secondly, he submits that the PO erred by failing to allow representations on, and deal properly with, the proportionality of his decision to revoke.

Loss of good repute on grounds of conviction

72. The Appellant submits that the PO was not entitled to use the conviction of a director in order to find that the operator was not of good repute, citing *Skip It (Kent) Limited & Others* [2010] UKUT 466 (AAC) at paragraph 11 where the Upper Tribunal agreed with the submission that a Traffic Commissioner is not entitled to make findings against anyone other than a licence holder. He also pointed out, in the alternative, that the legislation states that the decision maker "shall have regard to" the conviction and not "shall revoke the licence" as a result of a conviction. He went on to submit that the PO erred in finding that KPH was not of good repute as an individual due to his conviction.

Analysis (incorporating the law)

73. In the first instance, we note that KPH's conviction was not the sole reason that he found the operator to have lost its good repute. Regulations 5-9 of the Goods Vehicles (Qualification of Operators) Regulations (Northern Ireland) 2012, ("Qualification Regulations 2012") provide guidance on how to determine whether an operator (or an applicant) is of good repute. Guidance for TRU decision makers, on how to apply this legislation, is set out in the Practice Guidance Document No. 1 "*Good Repute and Fitness*" (current version 2.0 updated February 2024).

74. The PO did not make clear in his written decision, the precise details of the conviction he was considering in respect of KPH. By deduction from the papers, KPH was convicted of being knowingly concerned in the fraudulent evasion of excise duty and possession of false documentation at Maidstone Crown Court on 6 May 2014, for which he received a six-year prison sentence. Contrary to Mr McNamee's view, the PO was entitled to take this conviction into account in determining the repute of the company as operator. The PO identified Regulation 5(2) of the Qualification Regulations 2012 which permits the DfI to have regard to "all the material evidence" in determining whether a company (as in this case) is of good repute, including "any convictions or penalties incurred by the company, company employees or any other relevant person" (Reg 5(2)(a)). A "relevant person" includes "any officer, agent or employee of the company", which KPH satisfies as the company director (Reg 1(3)). The offence for which KPH was convicted was one under the law of the United Kingdom which is included within this legislation (Regulation 5(3)(a)). Consequently, KPH's conviction forms part of the "material evidence" which can be used to determine whether a company operator is of good repute. The PO did not err in this aspect of his decision.

75. While the question was not whether KPH was of good repute as an individual licence holder, it is notable that under Regulation 6(a) the DfI *shall* determine

that *an individual* is not of good repute if they have been convicted of a "serious offence" i.e., any conviction under the law of the United Kingdom which has warranted a sentence of imprisonment exceeding three months (Regulations 7(1) and (2)(a)). As KPH's conviction meets this criterion, he must be considered as an individual who is not of good repute. Again, the PO was correct in this determination.

76. The PO was also correct that under Regulation 9(1)(a) of the Qualifications Regulations 2012, the DfI *shall* disregard convictions that are spent, by virtue of the Rehabilitation of Offenders (Northern Ireland) Order 1978 ("the 1978 Order"):

> *"9.— (1) For the purposes of regulations 5 to 8—*
> *(a) convictions which are spent for the purposes of the Rehabilitation of Offenders (Northern Ireland) Order 1978 shall be disregarded; and*
> *(b) the Department may also disregard an offence—*
> *(i) if such time as the Department thinks appropriate has elapsed since the date of the conviction; or*
> *(ii) if the Department, having considered the number of offences committed by a person, determines that due to specific circumstances a negative determination of good repute for the person would constitute a disproportionate response.*
> *(2) In determining the good repute of a transport manager under regulation 13A(1)(b) regulations 5 to 9 shall apply as they apply to an individual with the omission of the words "or any other relevant person".*

77. Article 2(3)(a) of the 1978 Order permits convictions made by or before a court outside of Northern Ireland, such as the conviction in this case, to be included. While Article 3 of the 1978 Order provides that a person shall be treated as rehabilitated if the conditions contained within that Article are satisfied, a conviction which attracts a sentence of imprisonment in excess of thirty months, is excluded from rehabilitation (Article 6(1)(b)). Consequently, KPH's conviction which attracted a penalty of 72 months imprisonment is exempt from rehabilitation, under the 1978 Order, and is not considered as a spent conviction for these purposes. The provisions of the Rehabilitation of Offenders Act 1974 do not assist KPH in this case as the Qualification Regulations 2012 and the 1978 Order set out the clear position. In any event, KPH's conviction would not be spent under the Rehabilitation of Offenders Act 1974 until 7 years after the conclusion of his sentence which is 6 May 2027 and which has not yet passed. This was correctly explained by the PO at paragraph 34(c) of his decision.

78. Regulation 9(1)(b) gives the DfI discretion to disregard a conviction in the determination of good repute by reason of the time that has elapsed since *the*

date of the conviction and/or due to specific circumstances, a finding of loss of good repute as a result of the conviction would constitute a disproportionate response. The PO purports to have considered time and proportionality at paragraph 34(d) of his written decision however, we find that the reasons he provided were inadequate. The PO does not acknowledge, for example, that the date of conviction was approaching ten years prior to the PI, and that KPH completed his sentence in full (both the period of imprisonment and the period on licence) by 6 May 2020, some 3.5 years prior to his application to become the director of the operator company. He did not consider whether there had been any convictions since, and he does not appear to consider that KPH openly disclosed this serious conviction when he made the application to vary the operator's licence. While these particular factors may not have changed the PO's mind, they had the potential to do so. He comments that he has not been made aware of any "specific circumstances" that would merit a determination that he should disregard the conviction, however he sought no specific representations on this during or after the PI. In the absence of adequate reasons for the decision not to exercise his discretion under Regulation 9(1)(b), the PO's decision gives the impression that he closed his mind to any other consideration. So, while the PO was entitled to take the conviction into account, we find that his failure to fully consider and to give adequate reasons in respect of his discretion to disregard the conviction under Regulation 9(1)(b) amounts to a material error of law impacting upon the lawfulness of his decision in respect of loss of repute.

Proportionality and representations

79. Mr McNamee further submits that the decision to revoke the operator's licence was disproportionate. He considers that the PO had a range of other options available to him, suggesting suspension, curtailment, a period of grace or an "unless order", but none of these were considered. He also submits that a further procedural irregularity arose as the PO did not allow representations to be made at the PI in respect of the impact of a potential revocation decision, or on the suitability of other disposals.

The law

80. Section 24(1)(a) of the 2010 Act provides that a traffic commissioner *shall* direct that an operator's licence is revoked if it appears to the DfI that the operator no longer satisfies one or more of the requirements of s.12A of the 2010 Act: requirements that the operator has a stable and established operating centre, good repute, financial standing and professional competence. The PO must give notice to an operator that he/she is considering a direction to revoke the operator's licence (s.26(1) of the 2010 Act) and must hold a PI if the operator

requests one. The notice must state the grounds under which the PO is considering such a direction (s.24(3)). He must invite written representations regarding revocation under the stated grounds from the operator (s.24(3)(a)) which must be received within 21 days of the date of the notice (s.24(3)(b)).

81. Once a finding of loss of good repute has been made, revocation of the licence is the mandatory outcome, and this would ultimately put the operator out of business. For this reason, the proportionality of the finding (and the outcome) must be considered. Thus, to justify a finding of loss of repute, the matters found proven against the operator must be such that revocation of the licence is a proportionate regulatory response (see *T/2015/39 Firstline International Ltd & William Lambie v Secretary of State for Transport*). The power to revoke an operator's licence should be exercised so as "to achieve the objectives of the system" depending on the seriousness of the case before the traffic commissioner, rather than as punishment for regulatory infringements (*Thomas Muir Haulage Ltd v Secretary of State* 1998 SLT 666). It is a matter of fact and degree for the PO to determine according to the facts of the case before him.

82. The proportionality of a finding of loss of repute so as to revoke a licence requires consideration of the question, "Is the conduct such that the operator ought to be put out of business?" (*Bryan Haulage (No.2)* (T2002/217)). A preliminary question to this is "How likely is it that this operator will, in the future, operate in compliance with the operator's licensing regime?" (*2009/225 Priority Freight Ltd & Paul Williams*). This is ultimately a question of trust, which is established by balancing the negative factors with the positive factors in respect of an operator's conduct. The less likely it is that an operator is considered to be able to comply with the regulations in the future, the more likely a revocation (and possibly disqualification) are to follow. If a traffic commissioner answers these questions appropriately, then he need not explain why another option was unavailable, as revocation may be inevitable from that reasoning (*2016/046 R & M Vehicles Ltd, Graham Holgate and Michael Holgate*).

Analysis

83. Procedurally, the call-up letter dated 27 March 2024 constitutes the notice under s.26(1) of the 2010 Act. The letter was lengthy, and the first page outlined a list of possible outcomes for the operator, which included revocation of the licence. It took some time to locate reference to licence revocation as being a potential risk (late into Annex 5), but it did state that the operator should make arrangements in the event that the operator's licence was revoked (point 7 on page 5 of the documentation at Annex 2). It also stated that the DfI "may" consider revocation of the licence if it was found that the TM had lost his good repute (there was no TM in place at the date of the PI) and "shall" revoke the

licence if the licence holder loses good repute (Annex 5). The latter references were buried within the long call-up letter but they were there. The grounds on which the PO was considering revocation were set out in Annex 5, as outlined at paragraph 11 of this decision. The operator was given 14 days (not 21 days in line with s.24(3)(b)) from the date of the letter to submit representations.

84. With regards to the proportionality of the decision to revoke, the PO asked the *Priority Freight* question by balancing the negative aspects of the case against the positives. Firstly, he referred to the operator's "poor" compliance history (see paragraph 28 of this decision for the detail), and in particular the failure to download drivers' hours records during 2023. Notably, the majority of the compliance history relates to 2022 when the operator was under the control of Mr Carson as director and TM. We accept that the compliance matters arising from the stop on 14 September 2023 were potentially within the knowledge/control of KPH according to the findings of the PO, who determined that KPH was involved in the company in some form before his official application to vary the licence. However, there were no specific findings as to the precise nature of that control/knowledge so it is difficult to fully consider the significance of this involvement upon the compliance issues.

85. From the point when KPH officially took control of the operator company (1 October 2023), there was no TM in place from 5 December 2023 until the date of the PI, and this was identified on the negative side. It was balanced against the proposal of a new TM who gave evidence at the PI. However, the PO made no findings as to the suitability of the proposed new TM, therefore that was not a factor that could be taken into account in his balancing decision and one which we find to be a material omission from the list as it may have affected the PO's decision.

86. On the negative side, the PO noted the Appellant's failure to provide information in advance of the PI, and it is fair to say that the operator had been warned in the call-up letter that a failure to provide such information was likely to be viewed negatively at the PI. The PO correctly found that KPH would not be considered to have good repute as an individual applicant, and weighed this as a negative factor, however, the PO did not consider any positive to be found in the fact that the serious convictions had been openly disclosed in the application to vary the operator's licence, that some 10 years had elapsed since the conviction with no further convictions apparently having been recorded in that period (potentially six years since he was released from prison). His 10-year company director disqualification was considered to be a negative factor however it was not considered a positive factor that the disqualification had ended. The PO was entitled to count his view of how KPH gave evidence at the PI, and his failure to provide compliance documentation and evidence of financial standing, as part

of the negative list. However, the PO did not consider that this was the operator's first PI or that it was under new management, which had not been formally put in place. The PO concluded that on balance the operator was unlikely to comply with the operator's regime in the future if the licence was allowed to continue (paragraph 47 of the PO's written decision). However, we find that this conclusion was reached on the basis of materially incomplete considerations.

87. The PO went on, "I do not trust the operator or the director Kieran Hughes. I believe that the operator deserves to be put out of business and order revocation of the licence with effect from 31 May 2024" (paragraph 47 of the written decision). Strictly speaking this is not consideration of the *Bryan Haulage* question which asks *whether the conduct is such* that the operator ought to be put out of business.

88. According to the Upper Tribunal in *2011/28 Heart of Wales Bus & Coach Ltd and Clayton Francis Jones, "[g]enerally… to cross the line, Traffic Commissioners should require evidentially established and relevant conduct that is patently unacceptable in a regulated industry that requires operators and Transport Managers to be of good repute. There will be cases where it is only necessary to set out the conduct in question to make it apparent that the operator ought to be put out of business*" (at paragraph 22). We are not convinced that this "conduct" (see paragraphs 28-33 of this decision), arising from the first PI of the operator while under new management, meets this test. We find the PO does not provide adequate reasons to explain why the operator ought to be put out of business, which in turn necessarily requires consideration (with reasons) of the alternative options.

89. An alternative approach may have been to allow the company an opportunity to correct the regulatory shortcomings, through suspension or curtailment of the licence for example. Had the PO, for example, made a finding on the suitability of the proposed TM and allowed time for compliance systems to be put in place, the operator may have been able to retain good repute and avoid revocation of the licence (see for example, 2003/107 *R A Meredith & Son (Nurseries) Ltd*). However, no consideration was given to alternative options in the PO's decision, and no reasons were given as to why these alternatives were discounted (*2016/046 R & M Vehicles Ltd, Graham Holgate and Michael Holgate*).

90. Furthermore, at the conclusion of the hearing Ms McCreesh specifically asked the PO if there were any other matters that he sought representations on before the PI concluded. The PO said nothing further was required as he had covered everything on his list. By failing to take representations on the revocation of the operator's licence (or alternative disposals) at the conclusion of the PI, he

allowed the operator to leave under the impression that revocation was unlikely to be an outcome (see T/2010/022 *Coachman Travel Ltd & Saunders*). The PO's omission gives the impression that the new evidence completely changed that position. While he properly sought representations in writing, upon disclosure of the new evidence, the lack of reference to them in his written decision indicates that they were not fully considered.

91. To summarise we find, in respect of the PO's decision to revoke the operator's licence, that he did not give adequate reasons in respect of his decision not to engage his discretion to discount the Appellant's conviction. He made insufficient findings in order to properly balance the positives and negatives in this case (*Priority Freight*), and he has given inadequate reasons as to why the conduct of the operator is such that it ought to be put out of business (*Bryan Haulage*). The PO did not consider alternative options and/or give reasons for discounting those options. This is particularly problematic given the failure to take representations in respect of revocation of the licence during the PI, when it would have been most appropriate to do so, particularly as revocation was the eventual outcome and the written representations were not fully considered in his decision. An operator should be left in no doubt as to the reasons why its licence was revoked but in this case, the reasons do not do so. We find that these procedural irregularities and errors of law in respect of the decision to revoke the licence gives rise to further unfairness towards the operator, rendering the decision to revoke "plainly wrong".

Additional observations

Financial standing

92. The financial standing aspect of the decision was not disputed by the Appellant at the appeal hearing. Nonetheless, we make the following observations. The DfI must revoke a standard operator's licence, in accordance with s.24(1)(a) of the 2010 Act, if it appears that the licence holder no longer satisfies the requirement to be of the appropriate financial standing. This is a mandatory direction. Section 24(3AA) of the 2010 Act allows the holder of a standard licence to request a "period of grace" to provide time to establish the required financial standing. The DfI is not obliged to grant a period of grace, the maximum period of which is six months. When considering whether to grant a period of grace, the PO is entitled to look for some tangible evidence, beyond mere hope or aspiration, that granting a period of grace will be worthwhile and that there are reasonable prospects for a good outcome (*T/2014/08 Duncan (operator) & Mary McKee (transport manager)*, paragraph 7). The PO determined that, without more evidence of the precise financial position and the prospects of improvement to the operator's finances, he could not allow a period of grace

(paragraph 44 of the PO's decision). He therefore concluded that the bank statements did not demonstrate adequate financial standing as required by Regulation 9A of the Goods Vehicles (Qualifications of Operators) Regulations (Northern Ireland) 2012.

93. Ultimately however, while the financial standing information was provided late in the day, and the PO was more than fair in the time he allowed for it to be provided, it was given with the explanation that the business was not fully operational. This aligned with the evidence provided by KPH during the PI. Nevertheless, the PO did not explore the issue of financial standing at all during the PI. He did not take evidence on the financial position of the business, despite it having been raised two months prior to the PI, nor did he take evidence on any steps the operator proposed in order to ensure financial standing was established/maintained. When reminding the operator to provide the financial standing documentation after the PI, he did not seek representations on any request for a period of grace at that point either. We find it to amount to an error of law, to refuse to grant a period of grace, for an operator to demonstrate financial standing, due to a lack of information which had not specifically been requested.

Breach of s.23(1)(b) and (e) of the 2010 Act

94. Section 23 of the 2010 Act outlines the circumstances when an operator's licence can be revoked, suspended or curtailed. As is relevant to this case, s.23 states as follows:

> ***Revocation, suspension and curtailment of operators' licences***
> ***23****—(1) Subject to the following provisions of this section and the provisions of section 26, the Department may direct that an operator's licence be revoked, suspended or curtailed (within the meaning given in subsection (9)) for any reasonable cause including any of the following—*
> *(a) …*
> *(b) that the licence-holder has contravened any condition attached to the licence;*
> *(c) …*
> *(d) …*
> *(e) that any undertaking recorded in the licence has not been fulfilled;*
> *(f) …*
> *(g) …*
> *(h) …*

95. This provision is not a section of the 2010 Act that can be "breached". The PO is therefore "plainly wrong" when he states that the operator "breached" it in two respects. It is not clear if he revoked the operator's licence under this provision instead. Equally, as already outlined, the PO did not consider the alternative consequences available under this provision.

96. The PO states, at paragraph 46 of his decision, that the "*infringements and offences detailed in the documentation and outlined above and the failure to notify the DfI of them lead to*" this determination. While the call-up letter purports to set out the infringements (see the detail provided at paragraph 11 of this decision), it is not clear on the precise detail. No evidence was taken in respect of these "infringements" during the PI, most of which appear to have taken place while Mr Carson was director and transport manager. The PO has not made findings or given reasons as to what precise condition(s) and undertaking(s) were breached and in what manner. We find it to amount to a material error of law to engage this section of the 2010 Act without making adequate findings upon which the direction can be based.

Conclusion

97. Overall, for the reasons provided throughout this decision, we find the decision of the PO in this case to be "plainly wrong" as, rather unusually, it features a number of material errors of law and it is tainted by procedural irregularities, the combination of which mean that the proceedings against the operator are unfair and the ultimate decision is unlawful. A lack of clarity in the call-up letter has not assisted the PO in his role.

98. In light of the numerous issues within the handling of this case, we do not propose to redetermine the matter. The case must be remitted to the DfI to consider the position this operator finds itself in, the regulatory infringements in question, and the potential outcomes, before holding a further PI in front of a different decision maker.

99. We also make it very clear to the operator that it must operate in a manner which satisfies the regulatory requirements. It will no doubt have a challenging task to reassure the DfI that it is capable of correcting the compliance shortcomings, and should engage with the DfI in order to regain the important element of trust that is implicit in the holding of an operator's licence.

100. We apologise for the delay in issuing this decision, which required multiple meetings of the panel members to consider and make determinations on the multitude of issues identified in this case. We thank the parties for their patience, and indeed for their assistance in dealing with this case.

Ms L. Joanne Smith
Judge of the Upper Tribunal

Mr D Rawsthorn
Member of the Upper Tribunal

Mr S James
Member of the Upper Tribunal

(Authorised for issue on)
12 November 2025